

HAYES PAWLENKO LLP
Matthew B. Hayes (SBN 220639)
Kye D. Pawlenko (SBN 221475)
mhayes@helpcounsel.com
kpawlenko@helpcounsel.com
1414 Fair Oaks Avenue, Suite 2B
South Pasadena, CA 91030
Tel: (626) 808-4357
Fax: (626) 921-4932

7 Attorneys for Plaintiff
JAMES MCMANUS

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

12 JAMES MCMANUS, individually and as
13 a representative of a class of
14 participants and beneficiaries on behalf
of The Clorox Company 401(k) Plan,

15 Plaintiff,

16

17 THE CLOROX COMPANY; THE
18 EMPLOYEE BENEFITS COMMITTEE
19 OF THE CLOROX COMPANY 401(K)
PLAN; and DOES 1 to 10 inclusive.

20 Defendants

Case No. 4:23-cv-05325-YGR

**PLAINTIFF'S MEMORANDUM OF
POINTS & AUTHORITIES IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

Date: February 11, 2025

Time: 2:00 p.m.

Courtroom: 1

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INTRODUCTION

The Court need answer only a single question to resolve the instant motion to dismiss: *When* a 401(k) plan allows a fiduciary to decide among a menu of options for allocating plan assets, must the fiduciary endeavor to choose the option that best serves the participants' interests, or may it instead choose the option that best serves its own self-interests? Plaintiff's position is that, *when presented with such a choice*, the fiduciary duties at the core of the Employee Retirement Income Security Act ("ERISA") require the fiduciary to put aside its own self-interests and try to choose the option that is in the participants' best interests. *See Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995) ("A fiduciary has a duty to act in the best interests of the plan participants and beneficiaries.").

The plan here presents Clorox with such a choice when allocating forfeitures. Unlike other plans, the Clorox plan does not require that forfeitures be allocated toward a single use or even specify the order in which forfeitures must be allocated among several permissible uses. Instead, the plan permits forfeitures to be used to pay plan expenses and/or to reduce employer contributions, *as determined by Clorox in its discretion.* Everyone agrees that participant account balances would have been greater had forfeitures been used to pay plan expenses. Yet, year in and year out, Clorox invariably opted to use *all* forfeitures to reduce its own contributions instead.

To be sure, nothing in ERISA requires that a plan be designed to make forfeitures available to pay plan expenses. Nor must a plan be designed to make the allocation of forfeitures a discretionary and, therefore, fiduciary decision. But where, as here, the plan *does* make forfeitures available for paying plan expenses and the fiduciary entrusted with discretion to allocate forfeitures has an incentive to choose another available use, ERISA requires the fiduciary to eschew its own self-interests and endeavor to choose the best use for participants. Because Plaintiff alleges that Clorox's forfeiture allocation decisions were driven by its own self-interests, Plaintiff has plausibly alleged that Clorox breached its fiduciary duties.

STATEMENT OF FACTS

Plaintiff James McManus (“Plaintiff”) is a participant in The Clorox Company 401(k) Plan (“Plan” or “Clorox Plan”) whose account has been charged with a share of the Plan’s administrative expenses. FAC ¶ 11. The Plan is a defined contribution plan sponsored by defendant The Clorox Company (“Clorox”). *Id.* ¶¶ 6, 8.

6 The Plan incurs expenses for general administrative services such as legal,
7 accounting, and recordkeeping services. *Id.* ¶ 23. To pay for these expenses, an
8 annual fee is charged to participants and deducted from their individual accounts.
9 *Id.* The deduction of these expenses reduces the funds available to participants for
10 distribution and/or investing and deprives the Plan of the returns that it would have
11 earned on the amounts deducted. *Id.* ¶ 24.

12 The Plan requires Clorox to make an annual “Non-Elective Employer
13 Contribution” to the Plan on behalf of each eligible participant equal to 6% of the
14 participant’s yearly compensation. Plan Doc. MTD021 (§ 5.06). Unless an exception
15 applies, participants do not fully vest in these contributions until they have
16 completed five years of service. *Id.* MTD029 (§ 8.01(b)).

Participants who separate from service before these contributions fully vest forfeit their right to the unvested contributions. *Id.* MTD030 (§ 8.02(a)). What happens to the forfeitures is then up to defendant the Employee Benefits Committee of The Clorox Company 401(k) Plan (“Committee”), which is appointed by Clorox’s Board of Directors and if no appointment is made, is Clorox. *Id.* MTD045 (§ 15.01). The Plan provides that forfeitures “will be used, as determined by the Committee in its sole discretion, to pay Plan expenses, to reduce contributions to the Plan and to restore forfeitures.” *Id.* MTD030 (§ 8.02(a)(i)).¹

²⁶ As the Court noted, “[t]he Plan document lays out further procedures to follow when
²⁷ restoring previous forfeitures,” but those procedures are not relevant here because no
previous forfeitures were restored during the class period. MTD Order 7.

1 Unlike other plans, the Clorox Plan does not specify which allocation should
 2 take priority but instead leaves it to the discretion of Clorox acting by and through
 3 the Committee (together, “Defendants”). *Compare, e.g., Naylor v. BAE Systems, Inc.*,
 4 2024 WL 4112322, at *6 (E.D. Va. Sept. 5, 2024) (addressing plan forfeiture provision
 5 that “requires, without any discretion reserved to the [administrator], that forfeitures
 6 be directed toward restoring employer contributions for returning employees and
 7 offsetting [employer] contributions”) (emphasis in original), *with Walsh v. Allen*, 2022
 8 WL 256312, at *3-4 (W.D. Ky. Jan. 26, 2022) (addressing plan terms mandating that
 9 “[f]orfeitures will be used to pay Plan expenses”).

10 In deciding between using forfeitures to reduce employer contributions or pay
 11 Plan expenses, Defendants have a conflict of interest with the Plan’s participants.
 12 FAC ¶¶ 26-28. On the one hand, Defendants have an incentive to use forfeitures to
 13 offset Clorox’s contributions because that option saves the company money. *Id.* ¶ 26.
 14 On the other hand, absent a risk that Clorox would be unable to satisfy its
 15 contribution obligations, the Plan’s participants would be better served by using
 16 forfeitures to pay Plan expenses because that option would reduce or eliminate the
 17 amounts otherwise charged to their accounts to cover such expenses. *Id.* ¶ 27.

18 Despite the conflict of interest presented by this decision, Defendants failed to
 19 undertake any investigation into which option would better serve the participants.
 20 *Id.* ¶ 29. Defendants did not, for example, investigate whether there was a risk that
 21 Clorox would be unable to satisfy its contribution obligations if forfeitures were used
 22 to pay Plan expenses, or evaluate whether there were sufficient forfeitures to
 23 eliminate the Plan expenses charged to participants’ accounts and still offset a
 24 portion of Clorox’s contributions. *Id.* ¶ 30. Nor did Defendants consult with an
 25 independent non-conflicted decisionmaker to advise them in deciding upon the best
 26 course of action for allocating forfeitures. *Id.* ¶ 31. Instead, year after year,
 27 Defendants reflexively chose to use all forfeitures to reduce the amount of
 28 contributions Clorox was contractually obligated to pay to the Plan. *Id.* ¶¶ 32-33.

YEAR	CONTRIBUTIONS REDUCED BY FORFEITURES	EXPENSES DEFRAYED BY FORFEITURES	EXPENSES CHARGED TO PARTICIPANTS
2017	\$1,023,000	\$0	\$635,067
2018	\$700,000	\$0	\$958,497
2019	\$1,181,000	\$0	\$1,143,682
2020	\$650,000	\$0	\$1,160,889
2021	\$840,000	\$0	\$1,266,666
2022	\$1,315,000	\$0	\$1,273,494
2023	\$1,000,000	\$0	\$1,284,990

11 *Id.* ¶¶ 35-41.

12 Defendants based their forfeiture allocation decisions solely on Clorox's own
 13 self-interests and failed to consider the interests of the Plan's participants. *Id.* ¶ 34.

14 STATEMENT OF ISSUES TO BE DECIDED

15 When a 401(k) plan allows a fiduciary to choose how to allocate plan assets,
 16 does ERISA require the fiduciary to endeavor to choose the best allocation for
 17 participants or is the fiduciary free to choose any permissible allocation including one
 18 motivated by its own self-interests?

19 ARGUMENT

20 I. Plaintiff has Plausibly Alleged a Breach of Fiduciary Duty.

21 "To state a claim for breach of fiduciary duty under ERISA, a plaintiff must
 22 allege that (1) the defendant was a fiduciary; and (2) the defendant breached a
 23 fiduciary duty; and (3) the plaintiff suffered damages." *Bafford v. Northrop*
24 Grumman Corp., 994 F.3d 1020, 1026 (9th Cir. 2021). The Court has already found
 25 that Defendants acted as a fiduciary when allocating forfeitures. MTD Order 5-8.
 26 Because Defendants do not contest Plaintiff's damages allegations, the only
 27 remaining issue is whether Plaintiff has plausibly alleged that, in deciding how to
 28 allocate forfeitures, Defendants breached their fiduciary duties.

1 ERISA requires fiduciaries to discharge their duties “solely in the interest of
 2 the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1). ERISA also “imposes a
 3 ‘prudent person’ standard by which to measure fiduciaries’ investment decisions and
 4 disposition of assets.” *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014)
 5 (citation omitted); 29 U.S.C. § 1104(a)(1)(B). These duties require that fiduciaries
 6 “act in the best interests of the plan participants and beneficiaries.” *Barker v. Am.*
 7 *Mobil Power Corp.*, 64 F.3d 1397, 1403 (9th Cir. 1995). They are “the highest known
 8 to the law.” *Johnson v. Couturier*, 572 F.3d 1067, 1077 (9th Cir. 2009).

9 “To state a claim for breach of fiduciary duty, a complaint does not need to
 10 contain factual allegations that refer directly to the fiduciary’s knowledge, methods,
 11 or investigations at the relevant times.” *Terraza v. Safeway Inc.*, 241 F. Supp. 3d
 12 1057, 1070 (N.D. Cal. 2017). This is because, “[w]here,” as here, “a fiduciary
 13 exercises discretionary control over a plan, and assumes the responsibilities that this
 14 control entails, the victim of his misconduct will not, at the time he files his
 15 complaint, be in a position to describe with particularity the events constituting the
 16 alleged misconduct.” *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995). The
 17 allegations are sufficient so long as “the court may be able to reasonably infer from
 18 the circumstantial factual allegations that the fiduciary’s decision-making process
 19 was flawed.” *Terraza*, 241 F. Supp. 3d at 1070.

20 **A. Defendants Failed to Act “Solely” in the Interest of Participants.**

21 “The statute places a core obligation on an ERISA fiduciary to ‘discharge [its]
 22 duties with respect to a plan solely in the interest of the participants and
 23 beneficiaries.’” *Peralta v. Hispanic Bus., Inc.*, 419 F.3d 1064, 1071 (9th Cir. 2005)
 24 (quoting 29 U.S.C. § 1104(a)(1)); *see also Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042,
 25 1048 (9th Cir. 2000) (en banc) (“The core obligation of an ERISA fiduciary is to” act
 26 “solely” in the interest of participants and beneficiaries). While a decision “made
 27 solely to benefit” the fiduciary would, of course, violate this core obligation, “the
 28 fiduciary standard condemns far more than that, in its requirement of ‘an eye single’

1 toward beneficiaries' interests." *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000).
 2 Fiduciaries must have "complete loyalty to the interests of the beneficiary" and
 3 "exclude all selfish interest and all considerations of the interests of third persons."
 4 *Id.* at 224.

5 For this reason, "conflicts of interest can violate ERISA's loyalty requirement."
 6 *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (9th Cir. 1995). Whether they do
 7 turns on the subjective "motivation" for the fiduciary's decision. *Id.* at 1401-02; *see also Lauderdale v. NFP Ret., Inc.*, 2024 WL 751005, at *23 (C.D. Cal. Feb. 23, 2024)
 9 ("When assessing whether a fiduciary has complied with ERISA's duty of loyalty,
 10 what matters is *why* the defendant acted as he did.") (emphasis in original); *Tibble v. Edison Int'l*, 2010 WL 2757153, at *24 n. 19 (C.D. Cal. July 8, 2010) ("[T]he duty of
 12 loyalty is primarily concerned with conflicts of interest; thus, a breach of that duty
 13 requires some showing that the fiduciaries' decisions were *motivated by* a desire to
 14 serve the interests of [others] over those of the beneficiaries.") (emphasis in original);
 15 *A.F. v. Providence Health Plan*, 173 F. Supp. 3d 1061, 1073 (D. Or. 2016) ("ERISA
 16 demands assessment of a conflicted decisionmaker's state of mind.") (quoting Peter J.
 17 Wiedenbeck, *ERISA in the Courts* 165 (Federal Judicial Center 2008)).

18 Here, Plaintiff alleges that "[i]nstead of acting solely in the interest of Plan
 19 participants by using forfeitures in the Plan to reduce or eliminate the
 20 administrative expenses charged to their individual accounts, Defendants chose to
 21 use these Plan assets for the exclusive purpose of reducing Clorox's non-elective
 22 contributions to the Plan, thereby saving the Company millions of dollars at the
 23 expense of the Plan, which received fewer non-elective contributions than Clorox
 24 promised to pay the Plan, and its participants and beneficiaries, who were forced to
 25 incur avoidable expense deductions to their individual accounts." FAC ¶ 51.
 26 Plaintiff further alleges that "[i]n making this decision," Defendants "were motivated
 27 primarily or exclusively by Clorox's own self-interest rather than the interest of the
 28 Plan's participants and beneficiaries, which Defendants failed to consider." *Id.* ¶ 52.

1 These allegations “plausibly suggest that” Defendants “breached their duty of
 2 loyalty” by making “Plan-related decisions that were not in the best interests of Plan
 3 participants.” *Terraza*, 241 F. Supp. 3d at 1071. *See Rodriguez v. Intuit Inc.*, 2024
 4 WL 3755367, at *5 (N.D. Cal. Aug. 12, 2024) (“The complaint plausibly alleges that
 5 Intuit acted in contravention of ERISA’s mandate to provide benefits solely in the
 6 interest of participants and beneficiaries when it chose to use forfeitures to reduce its
 7 own contributions”); *Perez-Cruet v. Qualcomm Inc.*, 2024 WL 2702207, at *2 (S.D.
 8 Cal. May 24, 2024) (“Plaintiff plausibly claims that the Defendants breached their
 9 fiduciary duty to Plan participants by making a choice that put the employer’s
 10 interests above the interests of the Plan participants.”).

11 Because liability turns on Defendants’ “state of mind” when making their
 12 forfeiture allocation decisions, this claim cannot be resolved on a motion to dismiss.
 13 *Pilkington*, 72 F.3d at 1042 (“By assessing appellees’ state of mind, and finding
 14 appellants’ claim of improper motivation ‘unlikely,’ the district court improperly
 15 resolved a contested issue of fact.”); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1344
 16 (9th Cir. 1994) (finding plaintiff stated a claim by alleging that employer “breached
 17 its fiduciary duty by choosing annuity providers using an infirm bidding process that
 18 sacrificed participants’ and beneficiaries’ best interests to maximize the reversion of
 19 residual plan assets” to the employer).

20 **B. Defendants Failed to Act Prudently.**

21 “An ERISA fiduciary must discharge his responsibility ‘with the care, skill,
 22 prudence, and diligence’ that a prudent person ‘acting in a like capacity and familiar
 23 with such matters’ would use.” *Tibble v. Edison Int’l*, 843 F.3d 1187, 1197 (9th Cir.
 24 2016) (citation omitted). In evaluating prudence, “the court focuses not only on the
 25 merits of the transaction, but also on the thoroughness of the investigation into the
 26 merits of the transaction.” *Id.* (citation omitted). “When it is ‘possible to question the
 27 fiduciaries’ loyalty, they are obliged at a minimum to engage in an intensive and
 28 scrupulous independent investigation of their options to insure that they act in the

1 best interests of the plan beneficiaries.” *Howard v. Shay*, 100 F.3d 1484, 1488–89
 2 (9th Cir. 1996) (quoting *Leigh v. Engle*, 727 F.2d 113, 125–26 (7th Cir. 1984)). “Where
 3 the potential for conflicts is substantial, it may be virtually impossible for fiduciaries
 4 to discharge their duties with an ‘eye single’ to the interests of the beneficiaries, and
 5 the fiduciaries may need to step aside, at least temporarily, from the management of
 6 assets where they face potentially conflicting interests.” *Leigh*, 727 F.2d at 125.

7 Thus, when “an employer-fiduciary is faced with a decision on behalf of a plan,
 8 and has a self-interest at stake, the conduct of that fiduciary is ‘rigorously
 9 scrutinized’ by the courts.” *Crowhurst v. Cal. Inst. of Tech.*, 1999 WL 1027033, at *17
 10 (C.D. Cal. July 1, 1999), *aff’d*, 11 F. App’x 827 (9th Cir. 2001) (quoting *Cunha v.
 11 Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986)). “The prudence inquiry is fact
 12 intensive. And, because it involves the application of a reasonableness standard,
 13 rarely will such a determination be appropriate” prior to trial. *Mills v. Molina
 14 Healthcare, Inc.*, 694 F. Supp. 3d 1272, 1285 (C.D. Cal. 2023) (citation omitted).

15 Moreover, because “facts detailing the investigative process are likely within
 16 the sole control of” the defendant, “an ERISA plaintiff alleging breach of fiduciary
 17 duty does not need to plead details to which she has no access.” *Gamino v. KPC
 18 Healthcare Holdings, Inc.*, 2021 WL 162643, at *3 (C.D. Cal. Jan. 15, 2021) (internal
 19 quotation marks omitted). “Rather it is enough to allege facts” that “support an
 20 inference that the defendant failed to conduct an adequate inquiry.” *Id.*; *Chea v. Lite
 21 Star ESOP Committee*, 2024 WL 4357002, at *4 (E.D. Cal. Sep. 30, 2024) (same).

22 Here, Plaintiff alleges that “[i]n deciding how to allocate forfeitures,
 23 Defendants utilized an imprudent and flawed process.” FAC ¶ 58. “Despite the
 24 conflict of interest presented by this decision,” Plaintiff alleges that “Defendants
 25 failed to undertake any reasoned and impartial decision-making process to determine
 26 whether using forfeitures in the Plan to reduce the Company’s own contribution
 27 expenses, as opposed to the administrative expenses charged to participant accounts,
 28 was in the best interest of the Plan’s participants or was prudent, and failed to

1 consider whether participants would be better served by another use of these Plan
 2 assets after considering all relevant factors.” *Id.*; *see also id.* ¶¶ 29-31 (detailing
 3 actions not undertaken). These allegations state a plausible prudence claim. *See*
 4 *Rodriguez*, 2024 WL 3755367, at *7 (Allegations “that a prudent employer in this
 5 particular context would have at minimum engaged in a ‘reasoned and impartial
 6 decision-making process’ considering ‘all relevant factors’ before determining how to
 7 use the forfeited funds in the best interest of the participants and beneficiaries”
 8 sufficiently “stated a plausible claim for breach of the duty of prudence.”).

9 **II. Defendants’ Implausibility Arguments are Meritless.**

10 **A. Plaintiff does *not* Argue that ERISA Requires Forfeitures to be
 11 Used to Pay Plan Expenses or Forbids Forfeitures to be Used to
 12 Reduce Employer Contributions.**

13 Defendants argue that Plaintiff’s allegations are implausible because they
 14 would prohibit “what Congress and the Treasury Department have long understood
 15 analogous provisions in the Tax Code to permit since before ERISA’s enactment.”
 16 MTD 3. But Plaintiff’s allegations do not sweep so broadly. The Tax Code is
 17 concerned with a plan’s *design*, not fiduciary decision making. It permits a plan
 18 sponsor to design a plan which provides that forfeitures will be used to reduce
 19 employer contributions. Plaintiff does not contend that ERISA would prohibit a plan
 20 designed to use forfeitures for that purpose. Nor does Plaintiff contend that ERISA
 21 mandates plans be designed to use forfeitures to pay expenses. Indeed, a settlor
 22 could design a plan that removes the allocation of forfeitures from the
 23 administrator’s fiduciary functions by requiring, without any discretion, that all
 24 forfeitures be used for a single purpose.²

25 _____
 26 ² “[A] person who performs purely ministerial functions” that are “within a
 27 framework of policies, interpretations, rules, practices, and procedures made by other
 persons is not a fiduciary.” 29 C.F.R. § 2509.75-8.

1 Plaintiff's position is simply that where, as here, the Plan design gives a
 2 conflicted fiduciary complete discretion to choose between multiple uses for allocating
 3 forfeitures, ERISA requires the fiduciary to put its own interests aside and endeavor
 4 to pick the best use for participants. Nothing in the Tax Code purports to say
 5 otherwise. It is true that, *as Plan sponsor*, Defendants could amend the Plan to
 6 require that forfeitures be used to reduce Clorox's contributions. However, it does
 7 not follow that, *when acting as Plan fiduciary in administering the Clorox Plan*,
 8 Defendants could choose to use forfeitures to reduce Clorox's contributions when
 9 participants would be better served by using forfeitures to pay Plan expenses.

10 To be sure, ERISA permits Defendants to wear two hats. But it requires "that
 11 the fiduciary with two hats wear only one at a time, and wear the fiduciary hat *when*
 12 *making fiduciary decisions.*" *Acosta v. Brain*, 910 F.3d 502, 517 (9th Cir. 2018)
 13 (emphasis in original). Defendants' forfeiture allocation decisions were fiduciary
 14 decisions. MTD Order 5-8. As such, Defendants could only wear their fiduciary hat.

15 **B. Fiduciaries do Have a Duty to Maximize Retirement Savings
 16 When Managing Plan Assets.**

17 Defendants argue that they were under no obligation to choose the best
 18 forfeiture allocation option for participants because ERISA's fiduciary duties do not
 19 "require plan fiduciaries to 'maximize pecuniary benefits' enjoyed by participants."
 20 MTD 10. Defendants overlook Supreme Court precedent holding that ERISA
 21 fiduciaries must manage the plan to "maximize retirement savings for participants."
 22 *Fifth Third*, 573 U.S. at 420.³

23

24 ³ "[A]n ERISA fiduciary's duty is 'derived from the common law of trusts,'" *Tibble v. Edison Int'l*, 575 U.S. 523, 528-529 (2015), which has long held that a "fiduciary" has
 25 an "obligation to maximize the trust income by prudent investment" of its assets.
Blankenship v. Boyle, 329 F. Supp. 1089, 1096 (D.D.C. 1971); *see also Jicarilla Apache Nation v. U.S.*, 100 Fed. Cl. 726, 739 (Fed. Cl. 2011) (Under "common law of
 26 trusts" a "fiduciary" is "charged with maximizing trust income" when "choosing among the alternative investments" that are "authorized").

27

28

1 Defendants rely on *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th
 2 Cir. 2004), but *Wright* did not hold that there is no duty to maximize participants'
 3 retirement savings when managing plan assets. *Wright* held only that the duty does
 4 not require fiduciaries to increase benefits in *violation* of the plan's express terms.

5 The issue in *Wright* was whether ERISA's fiduciary duties required the
 6 company "to amend the Plan to permit the participants to sell a higher percentage of
 7 employer securities allocated to their Plan accounts than the percentage permitted
 8 by the Plan's express terms." *Id.* at 1096. Absent such a plan amendment, selling
 9 more company stock "would have been in violation of the Plan's express terms." *Id.*
 10 at 1097. The Court held that the company was "under no legal obligation to deviate
 11 from those terms" because a fiduciary's duty to maximize pecuniary benefits for
 12 participants is not "exclusive" of the duty "to comply with a plan as written unless it
 13 is inconsistent with ERISA." *Id.* at 1100.

14 Unlike in *Wright*, Plaintiff is not arguing that ERISA's fiduciary duties
 15 required Defendants to deviate from the Plan's terms. Whereas the plaintiffs in
 16 *Wright* argued that ERISA's fiduciary duties required the company to permit them to
 17 sell more employer securities "in *violation* of the Plan's express terms," *id.* at 1097
 18 (emphasis added), here Plaintiff argues only that Defendants should have used
 19 forfeitures to pay Plan expenses, an option the Plan expressly *allows*. Thus, unlike
 20 in *Wright*, there is no tension here between the fiduciary duty "to maximize
 21 retirement savings for participants," *Fifth Third*, 573 U.S. at 420, and the duty to
 22 follow the Plan's terms, 29 U.S.C. § 1104(a)(1)(D). *Wright's* statement that the
 23 former duty is not "exclusive" of the latter duty is simply not implicated here.

24 The other cases cited by Defendants are inapplicable for the same reason. In
 25 *Collins v. Pension & Insurance Committee of the Southern California Rock Products*
 26 & Ready Mixed Concrete Associations, 144 F.3d 1279, 1282 (9th Cir. 1998), the Court
 27 held that ERISA's fiduciary duties did not require the plan administrator to "amend
 28 the plan to increase benefits." In *Rozo v. Principal Life Insurance Company*, 48 F.4th

1 589, 594, 598 (8th Cir. 2022), the Court affirmed the district court’s finding that the
 2 fiduciary “set the best [interest rate] that it could for participants” and was under no
 3 obligation to deviate from that rate. And in *Foltz v. U.S. News & World Report, Inc.*,
 4 865 F.2d 364, 368, 370-74 (D.C. Cir. 1989), the Court held that ERISA’s fiduciary
 5 duties did not require the fiduciary to calculate benefits using a formula that
 6 contravened an “explicit directive of the Plan document.” None of these cases
 7 purported to relieve a fiduciary of its obligation to maximize participants’ retirement
 8 savings when deciding between *permissible* options for allocating Plan assets.

9 Accordingly, Defendants’ statutory obligation to act prudently and “solely in
 10 the interest” of participants when discharging the fiduciary responsibility of deciding
 11 between authorized options for allocating Plan assets clearly required that they
 12 consider which option best served the participants’ interests in maximizing their
 13 retirement savings. Because Plaintiff has alleged facts indicating that this decision
 14 was not based on such considerations, the First Amended Complaint plausibly
 15 alleges claims for breach of fiduciary duty.

16 **C. ERISA Requires Fiduciaries to Act *Both* Solely in the Interest
 17 of Participants *and* for the Exclusive Purpose of Providing
 18 Benefits and Defraying Expenses.**

19 Finally, Defendants argue that they complied with their fiduciary obligations
 20 because “they used forfeited employer contributions to ‘provid[e] benefits to
 21 participants,’ just as ERISA requires.” MTD 14 (quoting 29 U.S.C. § 1104(a)(1)(A)).
 22 But that statute has two requirements. It requires a fiduciary to “discharge his
 23 duties with respect to a plan solely in the interest of the participants and
 24 beneficiaries *and* for the exclusive purpose of (i) providing benefits to participants
 25 and their beneficiaries; and (ii) defraying reasonable expenses of administering the
 26 plan.” 29 U.S.C. § 1104(a)(1)(A) (emphasis added).

27 The issue here is not whether Defendants violated the “exclusive purpose”
 28 requirement but whether they acted “solely in the interest of the participants” as the

1 statute *also* requires. Plaintiff does not allege that Defendants used forfeitures for
 2 an impermissible purpose. Instead, Plaintiff alleges that, in choosing between the
 3 available options for using forfeitures, Defendants were improperly motivated by
 4 Clorox's own self-interests rather than the best interests of participants. FAC ¶ 34.

5 For example, in *Pilkington PLC v. Perelman*, 72 F.3d 1396 (9th Cir. 1995),
 6 Revlon purchased an annuity contract from Executive Life to cover the retirement
 7 benefits it promised participants. There was no question that this act complied with
 8 ERISA's exclusive purpose requirement. The issue was whether Revlon acted solely
 9 in the participants' interest when it selected Executive Life as the annuity carrier.
 10 The plaintiffs argued that Revlon's loyalty was "brought into question by the
 11 financial reality of the Executive Life annuity purchase" because "[b]y purchasing the
 12 annuity contract from Executive Life, the lowest bidder by more than \$13,000,000,
 13 more funds reverted to Revlon." *Id.* at 1401. The district court granted summary
 14 judgment to Revlon despite "strong evidence that reversion maximization figured
 15 prominently in Revlon's" decision. *Id.* However, the Ninth Circuit reversed because
 16 "the Revlon trustees' motivation may have deviated from that mandated by ERISA"
 17 insofar as there was evidence that "the trustees were motivated by economic self-
 18 interest." *Id.* at 1401-02.

19 So too here. Plaintiff alleges that in deciding to use forfeitures to reduce
 20 Clorox's contributions to the Plan, Defendants were motivated by Clorox's own self-
 21 interests rather than the interests of participants, which they failed to consider.
 22 FAC ¶ 52. That Defendants' chosen use of forfeitures was for a permissible purpose
 23 does not resolve whether the choice was made "with an eye single to the interests of
 24 the participants and beneficiaries." *White v. Chevron Corp.*, 2016 WL 4502808, at *4
 25 (N.D. Cal. Aug. 29, 2016) (citation omitted).

26 Defendants' reliance on *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999),
 27 is misplaced. *Hughes* did not hold that a fiduciary may be motivated by its own self-
 28 interests when managing plan assets. *Hughes* held only that "the incidental benefits

1 conferred upon Hughes when it amended the Plan are not impermissible under the
2 statute.” *Id.* at 445. In other words, “[i]t is no violation of a trustee’s fiduciary duties
3 to take a course of action *which reasonably best promotes the interest of plan*
4 *participants* simply because it incidentally also benefits the corporation.” *Morse v.*
5 *Stanley*, 732 F.2d 1139, 1146 (2d Cir. 1984) (emphasis added). However, the
6 “incidental benefit” must be “from conduct undertaken solely for the benefit of the
7 participants and beneficiaries.” *Crowhurst*, 1999 WL 1027033, at *17, aff’d, 11 F.
8 App’x 827 (9th Cir. 2001). Here, Plaintiff alleges that Defendants’ forfeiture
9 allocation decisions were undertaken solely for the benefit of Clorox. FAC ¶ 34.

10 **CONCLUSION**

11 For the foregoing reasons, Plaintiff respectfully requests that the Court deny
12 Defendants’ motion to dismiss Plaintiff’s First Amended Complaint.

13 DATED: January 9, 2025

14 **HAYES PAWLENKO LLP**

15 /s/Kye D. Pawlenko
16 Attorneys for Plaintiff

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